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(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Criminal Appeal No. 1691 OF 1997

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973

APPELLANTS: In Jail. B

1. Ramesh son of Siyaram Gonda aged about 25 years, Occupation- Cultivation R/o Pitechua, Police station Keshkal, Distt. Bastar(MP)

2. Mahesh son of Siyaram Gonda aged about 29 years, Occupation-Cultivation, R/o Pitechua, Police station Keshkal, Distt. Bastar(MP)

11131
14.8.97
by Shri P.D. Rao Advocate
Rlw A.R.

Versus

Respondent: State of Madhya Pradesh Through House Station Officer Police station Keshkal, Distt Bastar(MP)

CONVICTION

(27)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

(DIVISION BENCH)

Criminal Appeal No.1691 of 1997

Ramesh & another

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
J U D G E
15-2-2006

HON'BLE MR. JUSTICE DHIRENDRA MISHRA

Sd/-
Dhirendra Mishra
Judge

POST FOR JUDGMENT ON 20th FEBRUARY, 2006

Sd/-
L.C. Bhadoo
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1691 of 1997

Ramesh & another

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Miss Sangeeta Mishra, Advocate : For the appellants.

Mr. M.P.S. Bhatia, & Mr. Akhil Mishra, Panel Lawyers : For the respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. DHIRENDRA MISHRA, JJ.

J U D G M E N T

(Delivered on 20th February, 2006)

Following judgment of the Court was delivered by L.C. Bhadoo, J:-

1. Accused/appellants Ramesh & Mahesh have preferred this appeal under Section 374 (2) of the Cr.P.C. questioning the legality & correctness of judgment of conviction and order of sentence dated 2nd July, 1997 passed by learned Additional Sessions Judge, Kanker, District Bastar in Sessions Trial No.419/96 whereby learned Additional Sessions Judge after holding the accused/appellants guilty for commission of offence under Sections 302/34 & 392 of the Indian Penal Code sentenced each of the accused/appellant to undergo imprisonment for life and R.I. for seven years and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for four months respectively. However, co-accused Natthulal was acquitted

of all the charges and the present accused/appellants were also acquitted of the charge under Section 120-B of the Indian Penal Code.

2. The prosecution case, in brief, is that on 20.4.1996 Nadaram (PW-1), husband of Panikin Bai (since deceased) gave a merg intimation (Ex.P-11) in the Police Chowki Vishrampuri to the effect that on 19.4.1996 he went to plough the agricultural field, when he returned from the field his wife Panikin Bai informed him that Ramesh had given Rs.100/- to her and asked to supply five pailee rice, therefore, she left the house taking five pailee rice in a basket for supplying the same to Ramesh Gada. When his wife did not return till evening, a search was made by him to trace Panikin Bai but her whereabouts could not be traced out. He also went to the house of Ramesh Gada but he was informed that Panikin Bai has not come there. In the night also he tried to find out Panikin Bai, but her whereabouts could not be known. Today i.e. on 20.4.1996, in the morning when he was going to find out the whereabouts of his wife, on the way Sukhlal, Mangal & Usalram met him and informed that Panikin Bai is lying dead on Sargipal road. He went there and saw that his wife was lying dead, blood was oozing out from the left ear, some injuries were present on the head, rope was also there on the head and basket with rice & pailee were also lying there. On receiving this merg intimation, the same was forwarded to the Police Station Keshkaal and entered in the Roznamchasanha at No.17/96. The Investigating Officer left for the scene of occurrence and after giving notice (Ex.P-13) to the Panchas prepared the Panchnama (Ex.P-14) of the dead body of Panikin Bai. Site plan (Ex.P-15) was prepared by Arjun Singh, Assistant Sub-Inspector. Dead body of Panikin Bai

was sent for postmortem examination to the Primary Health Centre, Vishrampuri under Ex.P-1A, where Dr. G.R. Dhaneliya (PW-4) conducted the postmortem and prepared the postmortem report Ex.P-1. During police custody accused Ramesh gave memorandum (Ex.P-16) and in pursuance of that one old jute bag, one intact jute bag, one old shirt and one pink colour petticoat were taken into possession under Ex.P-8. At the instance of accused Ramesh basket, blood stained soil & plain soil were also taken into possession from the place of occurrence under Ex.P-17. The blood stained soil was also taken into possession from the kitchen garden of the house of accused Ramesh under Ex.P-18. One iron axe, one shirt, one tube of cycle and one old pink colour shirt were also taken into possession at the instance of accused Ramesh under Ex.P-19. One cycle was taken into possession under Ex.P-20 from Ghasuram. Ornaments along with one old bag were taken into possession from accused Mahesh Kumar under Ex.P-21. Thereafter, the offence against the accused persons was registered under Ex.P-12 i.e. F.I.R. Blood stained soil & ornaments were sent for chemical examination to Forensic Science Laboratory, Raipur from where report Ex.P-27 was received.

3. After completion of investigation, charge sheet was filed against the accused Ramesh, Mahesh & Natthulal for commission of offence punishable under Sections 302/34, 392 & 120-B of the Indian Penal Code in the Court of learned Judicial Magistrate 1st Class, Kanker, who in turn committed the case to the learned Sessions Judge, Jagdalpur from where learned Additional Sessions Judge, Kanker received the case on transfer for trial.

4. Learned Additional Sessions Judge after going through the record and hearing counsel for the parties framed the charges against the accused persons for the above mentioned offences. Accused persons abjured the guilt. The prosecution in order to establish the charge against the accused persons examined 13 witnesses. Statements of accused persons were also recorded by the learned Additional Sessions Judge under Section 313 of the Cr.P.C. in which they denied the material evidence appearing against them and pleaded innocence.

5. Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused persons, convicted and sentenced the accused/ appellants herein in the manner as mentioned in Para-1 of this judgment, however, they were acquitted of the charge under Section 120-B of the I.P.C. Accused Natthulal was acquitted of all the charges.

6. We have heard Miss Sangeeta Mishra, learned counsel for the accused/appellants & Mr. M.P.S. Bhatia & Mr. Akhil Mishra, Panel Lawyers for the State/respondent.

7. Homicidal death of deceased Panikin Bai is not in dispute.

8. As far as the question of involvement of accused/appellants in committing the murder of Panikin Bai and looting the ornaments of Panikin Bai is concerned, there is no direct evidence in this case and the whole case rests on the circumstantial evidence. In order to base the conviction of an accused on the circumstantial evidence, the settled law is that "*the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be*

of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof." The prosecution has tried to establish the charges against the accused persons on the following circumstances:-

a. That, the ornaments of deceased Panikin Bai as well as the axe i.e. weapon of offence, one old & one new jute bag, one pink colour shirt and one petticoat were recovered from the accused Ramesh & Mahesh;

b. That, the blood stained soil was taken into possession by the Investigating Officer Arjun Singh from the kitchen garden of accused Ramesh; and

c. That, deceased Panikin Bai was last seen alive entering the house of accused Ramesh.

9. Now, we shall proceed to examine & scrutinize the circumstantial evidence adduced by the prosecution in order to connect the accused/appellants with the crime in question. The ornaments of the deceased said to have been taken into possession by the Investigating Officer from

the accused Mahesh under Ex.P-21 and one iron axe, blood stained shirt of tericot, one cycle tube and one old shirt were taken into possession from the accused Ramesh under Ex.P-19. Fakir (PW-13) is said to be a witness of memorandum Ex.P-16, seizure memo Ex.P-19, Ex.P-20 & Ex.P-22A, but this witness has turned hostile and he has not supported the prosecution case. This witness has stated in his evidence that accused Ramesh has never asked the deceased to supply rice, no information was given by the accused Ramesh and no recovery was made in his presence. The other witness of recovery memo has not been examined, therefore, only the Investigating Officer Arjun Singh (PW-10) is remained. The Investigating Officer (PW-10) has stated that in pursuance of the information given by the accused Ramesh he recovered a bag, petticoat, axe, & tube and same was reduced in writing under Ex.P-16. He has further stated that on 22.4.1996 one axe, tericot shirt, one cycle tube & one pink colour shirt stained with blood were taken into possession under Ex.P-19 on being produced by the accused Ramesh.

10. In the first instance, one recovery witness namely Fakir produced as PW-13 has turned hostile and other witness has not been examined and he has stated that the recovered articles i.e. axe & bag are normally found in the villages. Moreover, PW-5 Sagram has stated that axe & tube was taken into possession from the accused Mahesh and gold & silver ornaments were taken into possession at the instance of accused Ramesh. Thus, the evidence of this witness is totally contrary to the record, because as per seizure memo Ex.P-21 ornaments were recovered from the accused Mahesh and axe & other articles were recovered at the instance of accused Ramesh under Ex.P-19. Therefore,

the evidence of this witness makes the evidence of Investigating Officer Arjun Singh (PW-10) untrustworthy. In the cross-examination PW-5 has stated that he do not know what articles were seized, but the bag, which was taken into possession, is normally found in every house of the village. As far as the recovery of ornaments is concerned, as per seizure memo (Ex.P-21) the ornaments were recovered from accused Mahesh, whereas there is no memorandum given by accused Mahesh, therefore, for the foregoing reasons the recovery of articles as well as axe, bags & shirt becomes doubtful and same does not inspire the confidence of the Court. Apart from that even though these articles were sent for chemical examination to the Forensic Science Laboratory, Raipur and as per FSL report on the axe, bag and shirt human blood was found but no serologist's report has been produced by the prosecution to show that the blood found on these articles was of the same blood group as of the deceased Panikin Bai. Therefore, in absence of such report accused persons cannot be connected with the recovery of axe, bag & shirt. Even the ornaments which were said to have been taken into possession from the accused Mahesh have not been produced in the Court and even not identified by Nadaram (PW-1), husband of deceased Panikin Bai and Juniya Bai (PW-3), daughter of deceased that the ornaments which were taken into possession from the accused Mahesh are of the deceased Panikin Bai. Therefore, there is no substantive evidence to that effect that the ornaments, which were recovered from the accused Mahesh, are of Panikin Bai. Identification memo of ornaments (Ex.P-9) has been filed and proved by the prosecution, but Nadaram (PW-1) & Juniya Bai (PW-3) have not stated in their

evidence that they had identified these articles before the jewelers under identification memo Ex.P-9. Even PW-8 Banshilal Soni before whom the ornaments said to have been identified by Nadaram & Jhuniya Bai in his cross-examination has stated that the police people called him and thereafter he had written the identification memo, same was written as the police people told him and identification was conducted near the police chowki. The ornaments in question were mixed with the ornaments which were brought by the police. He performed the process of identification as per the direction of the police. Therefore, from the above evidence even this identification memo does not inspire the confidence, as the ornaments mixed with the ornaments in question were brought by the police, memo was prepared as per direction of police and that too near the police chowki and this witness has not stated that the articles which were to be identified were produced before him in a sealed condition. Therefore, no confidence can be reposed on such identification memo and as such the prosecution has not been able to establish the recovery of ornaments as well other articles because no legal admissible evidence in that connection has been produced by the prosecution and as such, on the basis of recovery as well as identification of the ornaments, the accused/appellants cannot be connected with the crime in question and finding of the trial court to that effect is not based on the legal admissible evidence, therefore, same cannot be sustained.

11. As far as recovery of blood from the kitchen garden of the accused Ramesh is concerned, there is no serologist's report to the effect that the blood, which was found in the kitchen garden of the accused Ramesh, was the human blood and that too of the blood group of deceased Panikin Bai.

This circumstance also does not connect the accused Ramesh with the crime in question.

12. As far as the fact of last seen alive of deceased Panikin Bai in the house of accused Ramesh is concerned, as per the law laid down by the Hon'ble Apex Court in the matters of **Bodhraj alias Bodha and others Vs. State of Jammu and Kashmir** reported in **(2002) 8 SCC 45**, **Subhash Chand Vs. State of Rajasthan** reported in **(2002) 1 SCC 702** & **State of Karnataka Vs. M.V. Mahesh** reported in **(2003) 3 SCC 353** *'before convicting an accused based on the last seen together theory, the Court is required to ascertain from the legal clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of deceased must be so close and proximate that an inference regarding the guilt of accused can be drawn and there is no possibility of coming any third person in between the last seen together and death of the deceased. There must be unerringly clinching legal evidence that should point towards the involvement of the accused in commission of murder. Further, it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime.'*

13. Based on the above principle, if we look into the evidence of PW-1 Nadaram, who has stated that on the fateful day his wife informed him that she is going to deliver the rice at the residence of accused Ramesh and when she did not return he went to the house of Ramesh, but neither his wife nor Ramesh was available in the house and on the next day his wife was found dead on the Sargipal road. PW-3

Jhuniya Bai, daughter of deceased also stated that her mother left the house by saying that she is going to the house of Ramesh for delivering the rice. PW-5 Sagarram has stated that on Friday he saw Panikin Bai entering the house of Ramesh carrying rice and in the cross-examination this witness has stated that the dead body of Panikin Bai was found one kilometer away from the house of accused Ramesh. As per the evidence of PW-1 Nadaram when his wife did not return he went to the house of Ramesh but neither Ramesh nor Panikin Bai was present there and thereafter the body of Panikin Bai was found next day morning at the distance of one kilometer from the house of accused Ramesh. As such, there is nothing on record to connect the accused/appellants with the crime in question as the body of deceased was found next day morning that too one kilometer away from the house of accused Ramesh. Moreover, as per the evidence of Nadaram, in the evening he went to the accused Ramesh's house, but neither Ramesh nor Panikin Bai was present in the house and therefore, what happened thereafter there is no legal clinching evidence which indicates that the accused persons were the authors of the crime in question. The last seen theory is a week type of evidence and unless same is corroborated by some other material evidence no inference can be drawn regarding involvement of the accused in crime in question.

14. In view of the above, the prosecution has not been able to connect the accused/appellants with the crime in question based on the tests laid down by the Hon'ble Apex Court for resting the conviction based on the circumstantial evidence and therefore, the finding of the trial Court convicting the accused/appellants for commission of offence under

Sections 302/34 & 392 of the Indian Penal Code cannot be sustained and same is liable to be dismissed.

15. In the result, the appeal succeeds and same is allowed. Appellants Ramesh & Mahesh are acquitted of the charges of Sections 302/34 & 392 of the Indian Penal Code and conviction & sentence imposed upon them are hereby set aside. Appellants Ramesh & Mahesh be set at liberty forthwith, if not required in any other case.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Dhirendra Mishra
Judge

Roshan/-